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In The

SUPREME COURT of the UNITED STATES

..... Term, 1972

No. .....

CASANOVA GUNS, INC.,

Petitioner,

vs.

JOHN B. CONNALLY, Secretary of the Treasury, and W. A. COLLAWN, Assistant Regional Commissioner, Alcohol, Tobacco & Firearms,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Citation to Opinion Below 2

Jurisdiction 2

Statutes Involved 2-5

Questions Involved 6

Statement of the Case 7-8

Reasons for Granting the Writ 9-12

I. The initial charges against CASANOVA's, INC. should have been dismissed because a violation under Title 26 U. S. C. sec. 5841 and 5851 is unconstitutional 9-11

II. The evidence does not substantiate the finding of the trial court or of the Court of Appeals 11-12

Conclusion 13

Appendix

Opinion of the United States District Court, Eastern District 1a-6a

Opinion of the United States Court of Appeals—Seventh Circuit 7a-13a

Opinion of the United States Court of Appeals—Seventh Circuit 15a

TABLE OF AUTHORITIES

PAGE

Haynes vs. United States, 390 U. S. 85 ..... 6, 9, 10

Shamrock Oil & Gas Co. vs. Ethridge, 159 F. Supp. 693 12

Federal Statutes

26 U. S. C. 5841 ..... 2-3, 7, 9

26 U. S. C. 5851 ..... 3, 7, 9

28 U. S. C. 1254(1) 2

18 U. S. C. 922(g) 4

18 U. S. C. 922(h) 4-5

18 U. S. C. 923(d)(1)(B) 5, 8

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Petitioner CASANOVA GUNS, INC. prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on January 25, 1972, and February 14, 1972.

Citation to Opinion Below

The opinions of the United States Court of Appeals, printed in the Appendix, infra, p. 7a, has not been reported officially in the Federal Reporter as of the printing of this petition. The opinion of the United States District Court is printed in the Appendix, infra, p. 1a.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered January 25, 1972. The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing was entered February 14, 1972. The jurisdiction of the Court is invoked pursuant to 28 U. S. C. Sec. 1254(1).

Statutes Involved

26 U. S. C. 5841

Registration of Persons in general

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of busi-

ness or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation of which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with. Aug. 16, 1954, c. 736, 68A Stat. 725.

26 U. S. C. 5851

Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury. Aug. 16, 1954, c. 736, 68A Stat. 728; Sept. 2, 1958, Pub. L. 85-859, Title II, Sec. 203(h) (1) (2), 72 Stat. 1428.

18 U. S. C. 922(g)

Unlawful acts

(g) It shall be unlawful for a person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug and Cosmetic Act) or narcotic drug as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

18 U. S. C. 922(h)

Unlawful acts

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulating drug (as defined in section 201(v) of the Federal Food, Drug, and

Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U. S. C. 923(d)(1)(B)

Licensing

d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) or (h) of this chapter;

QUESTIONS INVOLVED

1. Whether the incorporation of CASANOVA GUNS, INC. was an incorporation to circumvent the statute restricting issuance of firearms licenses to convicted felons.

2. Whether the holding in *Haynes v. United States*, 390 U. S. 85 (1968) has a retroactive effect upon CASANOVA'S, INC.

STATEMENT OF THE CASE

CASANOVA'S, INC., a Wisconsin corporation engaged in the sporting goods business and gun sale business for approximately 35 years, was, in 1966 indicted in the United States District Court for the Eastern District of Wisconsin of the offense of possession of firearms which had not been registered as required by Title 26 U. S. C. sec. 5841, in violation of Title 26 U. S. C. sec. 5851.

On September 6, 1967, the corporation, by its vice-president, entered a plea of guilty to the charge as charged in the 5 count indictment.

On May 16, 1968, the Honorable District Court for the Eastern District of Wisconsin sentenced the corporation to pay a fine of $100.00 on each of the five counts, the total fine being $500.00.

CASANOVA's was incorporated on September 1, 1959. The principal stockholders of CASANOVA's, INC. were CLARENCE CASANOVA with 347 shares, JOHN P. CASANOVA with 50 shares, PATRICIA CASANOVA JARECKI with 50 shares, SUSAN CASANOVA with 50 shares, and GERALD DEROYSKI with 3 shares.

After entering a plea of guilty in September of 1967 and prior to sentencing in May of 1968, CASANOVA GUNS, INC. was incorporated, and more particularly on March 10, 1967, JOHN P. CASANOVA was the holder of all of the outstanding and issued stock.

On September 2, 1967, CLARENCE CASANOVA, on behalf of CANSANOVA's, INC., applied for a federal firearms license, which was issued.

Subsequently, CASANOVA GUNS, INC. applied for a federal firearms license, and it was issued and the assets of CASANOVA'S, INC. were transferred to CASANOVA GUNS, INC.

An application was then made for a renewal license by CASANOVA GUNS, INC., which renewal license was denied.

Based upon the denial of that application for renewal license, an administrative hearing was held before the hearing examiner of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, Department of the Treasury, and the denial of the renewal license was affirmed. This hearing was held pursuant to Title 18 U. S. C. sec. 923(f)(2) and the denial of said license was under the provisions of Title 18 U. S. C. sec. 923 (d).

The matter was then brought into the United States District Court for the Eastern District of Wisconsin, and a trial was held before the Honorable ROBERT E. TEHAN, District Court Judge, and his opinion dated October 16, 1970 is reflected in the appendix to this brief.

The opinion of the Honorable District Court affirmed the previous findings.

The matter was subsequently appealed to the United States Court of Appeals for the Seventh Circuit, and the Honorable Circuit Court of Appeals' opinion and order on motion for rehearing are reflected in the appendix of this brief.

REASONS FOR GRANTING THE WRIT

I.

The Petitioner is of the opinion that the facts do not warrant a denial of its license.

As indicated in the "Statement of the Case," the plea of guilty to the indictment was made on September 6, 1967, and the sentencing on the indictment and plea of guilty took place on May 16, 1968.

While the case was pending, the case of *Haynes vs. the United States,* 390 U. S. 85 was decided by this honorable court. The *Haynes* case was argued on October 11, 1967, which was approximately one month after the defendant in the case at bar entered its plea of guilty; however, the *Haynes* case was decided by this honorable court on January 29, 1968, approximately four months before the sentencing took place.

The *Haynes* case basically provided that a conviction under sec. 5851 Title 26 U. S. C. for possession of an unregistered firearm is not distinguishable from a conviction under 26 U. S. C. sec. 5841 for failure to register possession of a firearm, and both offenses must be deemed subject to any Constitutional deficiencies arising under the Fifth Amendment from the obligation to register.

Petitioner respectfully represents that he has not brought this issue up before the hearing examiner, the trial court or the Circuit Court of Appeals. The Petitioner represents that counsel for said Petitioner on this appeal is not the same counsel that originally represented the corporation in the criminal case.

The *Haynes* case is basically on all fours with the case before the court. It was a situation where in the *Haynes* case the defendant also pled guilty to the violation. The only difference between the *Haynes* case and the case before the court is that in the *Haynes* case the defendant did make a proper claim of the privilege against self-incrimination, but this Petitioner respectfully feels that once the defendant had pled guilty in the *Haynes* case, even though he had made the proper claim of privilege against self-incrimination, it places the present case in the same perspective as the *Haynes* case.

II.

It is interesting to note that in the District Court's opinion, and more particularly, the very last paragraph, we find this statement.

> "This conclusion is reluctant because the penalty of inability to obtain a license and resultant loss of a means of livelihood, imposed for what the record here reveals to be less than a heinous offense, is in our opinion too severe. However, we do not read the Gun Control Act as leaving the court any discretion to alleviate the penalty."

It is further interesting to note in the opinion of the United States Court of Appeals, and more particularly, in the last paragraph, the following:

> "Under the circumstances, although we realize the hardship the denial works upon the CASANOVA enterprises, we find that the commissioner's denial of the application and the District Court's affirmation of that decision were not clearly erronious."

The Government's position in this matter has been very simply stated, to-wit: CASANOVA GUNS, INC. was set up to circumvent the Gun Control Act of 1968 because CASANOVA's, INC. had been previously convicted of a violation of the National Firearms Act and that because of the similarity of officers and directors, CASANOVA's, INC. had the authority to control CASANOVA GUNS, INC.

The record is complete in that the corporate structure of both corporations, although similar in identity, is quite dissimilar in holding. It is clear that the record reflects the stock holdings in the two corporations were different.

The major contention on the part of the Government as followed by both the District Court and the Court of Appeals was the fact that when the second corporation was formed, the first corporation was given a $424,000.00 unsecured note payable on demand; and because the first corporation (a convicted felon) was owed this amount of money, both courts felt that the first corporation possessed a substantial degree of control over the second corporation.

Both courts evidently felt and placed little importance upon the fact that the indictment against JOHN P. CASANOVA, an officer and director of CASANOVA's, INC., was dismissed.

The Congressional purpose of the Gun Control Act of 1968 is as follows:

> "The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms

appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

The record is very clear in that upon the denial of this license to the Petitioner, the Petitioner stands to lose in excess of $400,000.00. We do not feel that this was the intent of the Gun Control Act.

The court has disregarded the ruling in *Shamrock Oil & Gas Co. vs. Ethridge,* 159 F. Supp. 693, which held that whether the corporation shall be disregarded depends on questions of fact. It would appear that both of these corporations were distinct entities set up in accordance with legal standards and were operating independently of one another.

CONCLUSION

For the reasons stated herein, Petitioner respectfully represents that the denial of the renewal license to CASANOVA GUNS, INC. is not supported by the evidence because the corporations are two distinct entities and further because the original conviction of CASANOVA's, INC. is not supported by the law or the Constitution of the United States of America.

Respectfully submitted,

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